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MICHAEL RODAK, JR., CL

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1357

JULIUS WILKERSON,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## REPLY MEMORANDUM FOR PETITIONER JULIUS WILKERSON

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Petitioner, Julius Wilkerson, respectfully submits this Reply Memorandum, pursuant to Rule 24(4) of the Rules of this Honorable Court, in order to

address himself to several points first raised in the Memorandum of the United States in Opposition.

SEARCH OF CO-DEFENDANT'S VEHICLE: PETITIONER'S "STANDING"

At page 3 of its Memorandum in Opposition, the Government argues:

> Petitioner lacks standing to challenge the search of co-defendant Clarence Hill's car and the questioning of Hill's son. He was not present at the time of the search, he has demonstrated no proprietary interest in the automobile, he was not charged with an offense requiring possession, and it was not his son who was questioned. See Brown v. United States, 411 US 223. The mere fact that petitioner was a co-defendant and co-conspirator of one whose Fourth Amendment rights allegedly were invaded does not confer standing upon him to complain of an unlawful search and seizure...(citations omitted)

Conceding that petitioner Wilkerson has made no showing that he enjoys any of the three alternative prerequisites

for standing enumerated by this Honorable Court in Brown v. US, supra, and furthermore is not a parent of young John Kennedy Hill, petitioner nevertheless submits that under the circumstances of this case he does enjoy standing to complain of the Government's conduct, for the following reasons:

I.

Prior to the 1972 amendment thereof, Rule 41 of the Federal Rules of Criminal Procedure purported to authorize only a "person aggrieved" by an unconstitutional search and seizure to move the district court for suppression of evidence and return of property. As a result of the 1972 amendment of Rule 41, however, only the present Rule 41(e), which governs only the motion for return of property, retains the "person aggrieved"

language, while the present Rule 41(f), governing the motion to suppress, merely provides: "A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12."

Thus it would appear, from a reading of the relevant Rule, that the traditional legislative requirement for standing, as expressed in the shorthand term "a person aggrieved", has been repealed.

II.

Petitioner, in his petition for writ of certiorari, invoked the rationale of this Court in Griswold v. Connecticut (1965) 381 US 479 in support of his contention that the Government agents' employment of young Hill infringed upon and violated a constitutionally protected right of "privacy"

adherent to the parent-child relationship. It is interesting to note that in Griswold---a prosecution mounted not against the marriage partners whose Ninth Amendment "privacy rights" were held violated, but rather against the physician and Planned Parenthood officer who provided contraceptive counselling to such married persons---the Court initially confronted an objection to the defendants' standing to complain of a violation of the constitutionally protected zone of privacy enjoyed by husband and wife in the marriage relation, and rejected the state's argument, stating:

> This case is more akin to Truax v. Raich, 239 US 33, where an employee was permitted to assert the rights of his employer; to Pierce v. Society of Sisters, 268 US 510, where the owners of private schools were entitled to assert the rights of potential pupils and their parents; and to Barrows v. Jackson,

> 346 US 249, where a white defendant, party to a racially restrictive covenant, who was being sued for damages by the covenantors because she had conveyed her property to Negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection, although no Negro was a party to the suit...The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless these rights are considered in a suit involving those who have this kind of confidential relation to them.

## "JUNIOR AGENT INDUCTION" PRECEDED THE SEARCH OF HILL'S CAR

At page 3 of the Memorandum in Opposition, the Government adopts be reference its Memorandum in Opposition filed in Hill v. US, No. 74-6202 on this Court's docket. In that Memorandum, in footnote 7 at page 5 thereof, the Government alleges, with respect to the federal agents' "enlistment" of Hill's 7-year-old son as a "junior agent" in the process of eliciting information about

his father's illegal drug activities, that:

> ...The record reveals that no promises or inducements were made to the boy prior to the search of the car. Rather, the $3.75 was given to the boy in small amounts by several agents on the way back from the car after the agents began kidding one another about rewarding the boy for his help. The "junior agent induction" also occurred following the search...

It is undisputed that the $3.75 was paid young Hill after the search and seizure at his father's automobile. However, the record of the suppression hearing clearly indicates that the "junior agent induction" occurred prior to the search of the vehicle, as part of the "buddy" relationship fostered by the agents with the boy in order to elicit information concerning his father's possession of contraband. See Agent Phillips' testimony in the printed

Supplemental Appendix at pp. 109-112.

Although the payment of money to a child as reward for information against his father is repugnant enough, this is not the thrust of petitioner's complaint, for a far more insidious threat is involved when agents of the state purport to formally enlist a 7-year-old's aid as a "special agent" whose duties include providing such information. While the lesser evil---the reward---occurred subsequent to the search, the greater evil---the "junior agent induction"---preceded the search and even produced the information on the basis of which the agents found probable cause to search the vehicle. For this reason, petitioner contends the fruits of such search should have been suppressed as evidence.

## CLOSING ARGUMENT: PREJUDICIAL REMARKS BY PROSECUTOR

Pretermitting repetition herein of the arguments advanced in petitioner's petition for certiorari pertaining to the Desmond and Flannery cases decided by the First Circuit Court of Appeal which conflict with the decision of the Court below, petitioner would nevertheless respectfully remind this Court that, with respect to the distinction between "failure of the defendants" and "failure of the defense" to counter or explain prosecution evidence, it must be borne in mind that jurors are laymen, not trained or versed in nice legal distinctions. While the distinction involved is a valid one, and in most cases readily understood and easily applied to the circumstances of the case, nevertheless generations of prosecutors have devised

innumerable ingenious methods of "skirting border" between the two concepts, a technique which is often followed by conviction, the cause and effect relationship being incapable of determination absent interrogation of jurors concerning their deliberations.

In the instant case, Wilkerson's participation in the conspiracy was evidenced only by the testimony of the accomplice Barbara Smith and the evidence of his sending a money order to co-defendant Hill at co-defendant Diggs' New York address. All the other evidence adduced by the Government implicated either Hill or Diggs or unindicted co-conspirators.

The jury was properly instructed to receive the testimony of an accomplice with caution (R. 540), and, in

the course of its deliberations, the following chronology of events occurred:

1:10 pm---jury began deliberating (R.562)

3:55 pm---court received note from foreman: "We have discussed all the evidence in extreme and cannot reach a unanimous decision. We await further instructions." (R.564)

4:00 pm---court instructed jury to continue deliberations (R.564-565)

4:05 pm---court received note from foreman: "Re: Intent to distribute and to distribute heroin. Does possession of and packaging of heroin meet this intent? Re: Conspiracy. Does only one of the defendants together with one of the non-indicted co-conspirators constitute conspiracy? Would like to have instructions provided in open court." (R.565)

4:20 pm---court gave instructions to jury in open court (R.563-571)

4:35 pm---jury resumed deliberations (R.571)

4:40 pm---pursuant to request of defense counsel, court gave additional instructions to the jury (R. 573-576)

4:50 pm---jury resumed deliberations (R.576)

5:55 pm---due to illness of juror, jury sent home after being instructed not to discuss case and to return on morrow (R.577-580)

10:15 am (following day) jury resumed deliberating (R.581)

11:30 am--court received note from foreman: "We have reached a unanimous decision on two of the defendants and are deadlocked on one. Does the decision have to be made on all defendants. We await your further instructions." (R.581)

11:40 pm--court instructed jury to continue deliberations (R.532-583)

11:45 pm--jury resumed deliberations (R.583)

1:25 pm---jury returned unanimous verdict of guilty as to all three defendants (R.583)

The question "Does only one of the defendants together with one of the non-indicted co-conspirators constitute conspiracy?" is indicative that the jury did not readily credit co-conspirator

Barbara Smith's testimony concerning petitioner's involvement, since Clarence Hill was certainly far more deeply implicated by the evidence than was petitioner, of for that matter, even Clarence Diggs.

Against this background, then, the money order became the crucial factor in determination of Wilkerson's guilt/innocence. The transmission of a money order of course is an act innocent in itself, although it may be done in furtherance of an unlawful objective. The Government alleged that the transmission of the money order was an overt act in furtherance of the conspiracy, but failed to adduce any evidence bearing directly on the transaction which would indicate a nexus with narcotics traffic; instead, the Government argued in closing

argument:

> ...There is no other evidence presented, other than the association between these three individuals was for anything, but to distribute heroin...

urging the jury to infer from the absence of contradictory or explanatory evidence that the money order was part of a narcotics conspiracy, when the only apparent competent witnesses to the intentions of the parties to the transaction were petitioner and his co-defendant Hill, and perhaps the co-defendant Diggs. These circumstances, taken together with the prosecutor's invitation to consider the demeanor of the witnesses and of the defendants, demonstrates an indirect "comment" on the failure of the defendant Wilkerson to testify in his own behalf.

Furthermore, the "curative" effect

of the standard instruction on failure of defendants to testify included in the court's charge to the jury must be weighed in the light of Mr. Justice Jackson's remark in his concurring opinion in Krulewitch v. US (1949) 336 US 440,453:

> ...The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. US, 332 US 539, 559, all practicing lawyers know to be unmitigated fiction...

Petitioner respectfully submits that the position taken by the First Circuit regarding this species of argument, as set forth in US v. Flannery (1st Cir 1971) 451 F2d 880, 881-882, is the correct one, and that, inasmuch as the decision below in the instant case is irreconcilable with Flannery, for the reason set forth supra, as well as in the petition for writ of certiorari, this

Honorable Court should issue a writ of certiorari to the court below.

WHEREFORE, petitioner Julius Wilkerson respectfully prays that this Honorable Court grant unto him all relief prayed for in his petition for writ of certiorari, and for any and all such other relief as the cause and the interests of Justice may permit.

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CERTIFICATE OF SERVICE

I, the undersigned Michael F. Barry, Esq., attorney for Julius Wilkerson, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 11th day of July, 1975, I served copies of the foregoing Reply Memorandum for Petitioner Julius Wilkerson, including Appendix "A", thereof, on the United States of America, respondent herein, by leaving three (3) copies thereof at the office of Hon. Mary Williams Cazalas, Assistant U.S. Attorney, 500 St. Louis Street, New Orleans, La. 70130, and by mailing three (3) copies in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, pursuant to Rule 33.2(a) of the

Rules of the Supreme Court of the

United States.

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APPENDIX "A"

Petitioner here reproduces the pertinent and relevant portions of Rule 41 of the Federal Rules of Criminal Procedure; as amended:

...

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

...